

**CRAVEN LOGGING COMPANY,
151-10**

) **AGBCA No. 95-**

Applicant)
)
)

**Application for Attorneys' Fees
and Expenses Under the Equal Access
to Justice Act**)
)
)

Representing the Applicant:)
)

Thomas P. Craven, pro se)
Owner, Craven Logging Company)
2077 West Way)
South Lake Tahoe, California 96150)
)

Representing the Government:)
)

Jack Gipsman)
Office of the General Counsel)
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San Francisco, California 94105-4511)
)
)

DECISION OF THE BOARD OF CONTRACT APPEALS

July 20, 1995 _____

OPINION BY ADMINISTRATIVE JUDGE SEAN DOHERTY

This is a decision on Applicant's Application for Attorneys' Fees and Expenses in the amount of \$13,946.61 under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Under the Act, fees and expenses may be awarded to a prevailing party when the Government's position was not substantially justified. The Government does not dispute that the Applicant was the prevailing party in the underlying appeal, Craven Logging Company, AGBCA No. 94-210-2. In that case, the Applicant contested assessment of \$9,000 in liquidated damages and associated charges of \$805.46. The Board ruled in favor of Craven Logging in an unpublished decision under the Board's Expedited Procedure, finding the Government had not met its burden of proof.

The Government opposes the Application on the grounds that the Applicant had represented itself during the course of the appeal; that the Government was substantially justified, and that the Applicant did not identify the position of the Government that was not substantially justified.¹

The case involved a timber sale and, within that sale, an exchange of trees agreed to by the parties. A dispute arose as to which trees had been exchanged, because of problems involving the marking of the trees, most particularly as to 45 trees cut and removed by Applicant. The Government assessed liquidated damages of \$200 per tree under contract clause CT6.32, which provided for such damages in the event reserve trees were unnecessarily or negligently damaged or destroyed by the purchaser's operations. Relying on prior decisions of this Board, the Board concluded that the Government bore the substantial burden to establish a negligent taking. The Board found that the Government had not met that burden base of proof, and sustained the appeal.

Applicant supports the \$13,946.6 claimed with invoices from two law firms. The invoices were not disputed by the Government and were in sufficient detail to identify their application to the underlying appeal. Applicant was not represented by an attorney at the hearing, a circumstance not addressed by the parties, but reasonably understood once attorneys' fees had exceeded the amount in contention. If otherwise allowable, the claimed costs would be recoverable, as would attorneys' fees to the maximum of \$75/hour allowed by U. S. Department of Agriculture regulations (7 CFR § 1.186(b)) despite the Government's assertions to the contrary. Labco Construction, Inc., AGBCA No. 95-104-10, 1995 WL 275930 (May 10, 1995).

The Government's assertion that Applicant does not identify the position of the Government that was not substantially justified is unfounded. We find such assertion amply stated in Applicant's application which states in part:

Before retaining legal counsel, I made every attempt to settle this dispute with LTBMU [Lake Tahoe Basin Management Unit] timber department. I stated my position verbally to numerous members of the timber staff. I met on the sale area to demonstrate the documentation on site for my position with the Sale Administrator and the Contracting Officer, which in this case was the Forest Supervisor. I followed our visit with a position statement in writing and finally a video presentation. If anyone in the timber department, the sale administrator, the forest service representative, the timber management officer of the contracting officer, had evaluated the evidence fairly, with an open mind, I would not have required legal counsel. When the Forest Service decided to pursue criminal investigation of the

¹ The Government initially also questioned whether the Applicant met size requirements of the Act and whether attorneys' fees were adequately presented. The Government stipulated Craven Logging met size requirements so that a net worth exhibit was not needed; also, a rate was stipulated for one of the law firms involved, thereby eliminating a question in that regard.

cutting of the disputed trees on the Cam Wasiu II sale, I was left with no alternative but to seek legal counsel to defend myself.

The dispute in the underlying appeal was a factual one and one which ultimately was sufficiently close to be decided on the burden of proof. There was conflicting testimony by credible witnesses. Trees had been exchanged; however, remarking of the trees had not been completed. There was opportunity for misunderstanding. The Government could reasonably rely on the honest understanding of its witnesses. The Government is substantially justified in litigating such material facts. See Giuliani Contracting Co., Inc., AGBCA No. 91-166-10, 92-2 BCA ¶ 24,930, holding the Government is justified in litigating close questions of law or fact.

DECISION

Applicant's Application for Attorneys' Fees and Expenses is denied.

SEAN DOHERTY
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

ROBERT M.M. SETO
Administrative Judge

Issued at Washington, D.C.
July 20, 1995